IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

NO. 85-5939

EULOGIO CRUZ,

Petitioner,

- against -

NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE NEW YORK STATE COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

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The respondent respectfully requests that the Court deny the petition for a writ of certiorari, seeking review of the New York Court of Appeals' decision in this case.

QUESTION PRESENTED

Whether a writ of certiorari should issue to review a decision of the New York Court of Appeals, which correctly applied the standard promulgated by this Court for determining whether confessions made by multiple criminal defendants are interlocking, thus allowing the defendants to be tried jointly.

STATEMENT OF THE CASE

The Indictment

On June 11, 1982, the Grand Jury of Bronx County filed an eleven-count indictment charging petitioner with the crimes of Murder in the Second Degree (two counts), Robbery in the First Degree (two counts), Robbery in the Second Degree, Criminal Possession of a Weapon in the Second Degree (two counts), Criminal Use of a Firearm in the Second Degree (two counts), and Criminal Use of a Firearm in the First Degree (two counts). Bronx County Indictment Number 2232 of 1982.

The Pretrial Motion And First Trial

Between May 25 and 30, 1983, before The Honorable Fred Eggert, petitioner's co-defendant and brother, Benjamin Cruz, moved to suppress his videotaped statement to an assistant district attorney on the ground that the statement was involuntary. Following the denial of this motion, petitioner moved to sever his case from his brother's. Petitioner argued that if Benjamin's confession were admitted at a joint trial and if Benjamin did not testify, he would be denied his right to confrontation. In opposition, the People asserted that petitioner himself made a confession to a private citizen, Norberto Cruz (no relation), which fully "interlocked" with the co-defendant's statement. Thus, the prosecutor contended, the rule announced in Bruton v. United States, 391 U.S. 123 (1968) would not be violated by a joint trial. Justice Eggert reserved decision on the severance motion pending the receipt of trial testimony.

At the first trial, petitioner renewed the Bruton motion which

Justice Eggert denied. In a written decision dated June 10, 1983 [People v. Cruz, 119 Misc.2d 1080,465 NYS.2d 419 (Sup. Ct. Bx Cty 1983)], the court found that the statements of the Cruz brothers "interlock fully as to the details of the crime and as to the full liability of each defendant for the crimes charged". Thus, the court denied petitioner's motion for a separate trial.

The Mistrial

During the jury's deliberations, at the end of the first trial, petitioner moved for a mistrial on the grounds that one of the jurors was becoming violent and insisting on petitioner's guilt for reasons unrelated to the trial evidence. Finding "manifest necessity" for a mistrial, Justice Eggert granted petitioner's motion.

THE SECOND TRIAL

The People's Case

On November 29, 1981, at 5:20 a.m., Victoriano Agostini was found dead, lying in a pool of blood at the Gaseteria service station, which he attended on 149th Street and Prospect Avenue in The Bronx. Later that morning, at approximately 10:00, petitioner and his brother, co-defendant Benjamin Cruz, visited their lifelong friend, Norberto Cruz (no relation), at the latter's apartment in The Bronx. Petitioner, who was nervous and wore a blood-stained bandage around his right forearm, told Mr. Cruz that he and his brother had robbed a gas station. Petitioner stated further that he had struggled with the station attendant, and that during the fight the attendant bent down, procured a gun, and shot him. In response, petitioner continued, petitioner's brother Benjamin jumped up and fired at the attendant.

After Benjamin gave Norberto Cruz a similar account of the robbery/shootout, Mr. Cruz offered to take petitioner to the hospital for treatment of his wound. Petitioner declined his friend's overture, reasoning that a hospital visit under the circumstances would be too dangerous.

Petitioner and his brother then left with Mr. Cruz' brother Jerry.

The next day, November 30, 1981, petitioner's brother Benjamin returned to Norberto Cruz' apartment, this time alone, at approximately 4:00 p.m. At this time, Benjamin advised Norberto to clean the blood out of Jerry Cruz' car because it would be dangerous to leave the car in that condition.

An autopsy, performed on Victoriano Agostini the following day, revealed that he died from two gunshot wounds to the head. One of the bullets entered Mr. Agostini's head above his right ear from a distance of three to six inches. The second wound entered the left front part of the victim's head, and followed a downward and backward path to the right rear part of the head. Additionally, blunt force injuries were found on the bridge of Mr. Agostini's nose, around his eyes, on his right cheek and on his left shoulder.

Approximately four months after Mr. Agostini's death, Jerry Cruz, Norberto Cruz' brother, was killed. When Detective George Wood was investigating the Jerry Cruz homicide, he spoke to Norberto several times in March and April, 1982. On April 27, 1982, Norberto informed Detective Wood of petitioner's and his brother Benjamin's visit on the day of Victoriano Agostini's death.

Six days later, on May 3, 1982, Detective Wood was contacted by petitioner's brother Benjamin concerning the Jerry Cruz homicide. While speaking about that incident, Benjamin suddenly admitted that he had shot a man who had fired at petitioner in a gas station on 149th Street. After hearing his Miranda warnings, Benjamin agreed to speak to an assistant district attorney, on videotape, about the Agostini homicide.

Benjamin Cruz admitted to Assistant District Attorney Allen Karen that he and petitioner held up a gas station in November, 1981. When the attendant resisted, petitioner hit him with a gun on the top of his nose and a struggle ensued. The attendant managed to reach a gun and shot petitioner in the arm, after which Benjamin shot the attendant in the head. Benjamin and petitioner then fled with $62.00 in a car driven by Jerry Cruz.

The Defense

Petitioner presented no witnesses or evidence on his own behalf. Co-defendant Benjamin Cruz called his mother (petitioner's step-mother) who testified that Benjamin received psychiatric treatment in Puerto Rico.

The Verdict And Sentence

Following the trial evidence and the court's instructions, a jury found petitioner guilty of Murder in the Second Degree [New York Penal Law section 125.25(3)]. Thereafter, Bronx County Supreme Court Justice Joseph Cerbone sentenced petitioner to an indeterminate term of imprisonment of from fifteen years to life.

The State Court Appeals

On direct appeal from his conviction, in the Appellate Division of the New York Supreme Court, First Department, petitioner argued that the admission of his brother's confession violated his rights under the Confrontation Clause as interpreted by this Court in Bruton v. United States, 391 U.S. 123 (1968), as well as his rights pursuant New York State fair trial standards for trials involving multiple defendants. On October 25, 1984, the Appellate Division unanimously affirmed petitioner's conviction without opinion. People v. Cruz, 104 A.D.2d 1060 (1st Dept. 1984). Subsequently, on January 3, 1985, the Honorable Bernard S. Meyer, Associate Judge of the New York Court of Appeals, granted petitioner leave to appeal his conviction to that Court. People v. Cruz, 64 N.Y.2d 779 (1985).

On October 17, 1985, the New York Court of Appeals, by a four to two vote, affirmed the order of the Appellate Division. People v. Cruz, 66 N.Y.2d 61, 485 N.E.2d 221 (1985). Relying on this Court's plurality opinion in Parker v. Randolph, 442 U.S. 62 (1979), the majority held that the interlocking confession exception to the Bruton rule applies regardless of differences in the reliability of the respective statements.

ARGUMENT

POINT

A WRIT OF CERTIORARI SHOULD NOT ISSUE TO REVIEW A DECISION OF THE NEW YORK COURT OF APPEALS WHICH CORRECTLY APPLIED THE STANDARD PROMULGATED BY THIS COURT FOR DETERMINING WHETHER CONFESSIONS MADE BY MULTIPLE DEFENDANTS ARE INTERLOCKING.

In Bruton v. United States, 391 U.S. 123 (1968), the Court held that two defendants cannot be jointly tried where one has made a confession which implicates the other, and the confessing defendant does not testify. Seeking issuance of a writ of certiorari, petitioner correctly tallies a four-four split of the Court in Parker v. Randolph, 442 U.S. 62 (1979): a four-justice plurality holding that the Court's decision in Bruton v. United States does not apply to cases where all defendants have given interlocking confessions, and the remaining justices, one in a concurring opinion and three in dissent, stating that Bruton should bar a joint trial even in an interlocking confession case, thereby altering the focus to whether the Bruton error is harmless. Petitioner also correctly points out a post-Parker split in the Circuit Courts of Appeals, some circuits following the plurality reasoning and others adhering to that of the concurrence and dissent. The point petitioner misses, however, is that the split of authority concerning the applicable analysis is overshadowed by the consistent results reached regardless of which approach is used. Much like the outcome of a grand debate over whether twelve o'clock midnight is the beginning or end of a day, therefore, the proper answer to petitioner's Bruton riddle is: it just doesn't matter.

Every member of the Court who addressed the question in Parker v. Randolph, supra, found the joint trial of Randolph, Pickins and Hamilton to be proper: the plurality, through its position that Bruton had no application to an interlocking confession trial and the concurrence through its opinion that the Bruton error was harmless. The dissenting justices never reached the issue because they deemed the Court bound by the lower courts' determinations that the Bruton error was not harmless. Parker v. Randolph,

442 U.S. at 81-82. Therefore, the very decision from which petitioner alleges such confusion has emanated, was itself a unanimous one regarding the ultimate propriety of the joint trial.

More illustrative of the much-ado-about-nothing quality of the issue presented herein, is the uniformity in the results of the Circuit Courts of Appeals. Regardless of the analysis employed, joint trials, in which all defendants confessed to the charges and their statements made out the same elements of the crime, have been upheld. Similarly, where one defendant's confession is more damaging legally, the statements have been found non-interlocking, and the convictions have been reversed as they would have been by any member of the Parker Court.

Examples, using the circuit court cases relied on by petitioner (petition, p. 9), abound. United States v. Kroesser, 731 F.2d 1509 (11th Cir. 1984), a case which, petitioner correctly notes, has adopted the Parker plurality analysis, affirmed the defendants' convictions since their confessions each made out all of the elements of the crime charged. 731 F.2d at 1518-1519. Conversely, United States v. Parker, 622 F.2d 298 (8th Cir. 1980), a decision which adheres to the harmless error approach advanced by the Parker concurrence and dissent, reversed the convictions of defendants Parker and Todd since, unlike defendant Ward's statement, their confessions failed to make out the elements of murder and thus were less legally inculpatory. 622 F.2d at 301-304. The conclusion to be drawn, therefore, is the one set forth in another decision relied on by petitioner, namely that "[w]e need not decide which of the two approaches in Parker should govern this case: under either approach, [petitioner's] conviction was constitutionally sound." Montes v. Jenkins, 626 F.2d 584,587 (7th Cir. 1980).

Indeed, petitioner Eulogio Cruz' conviction was "constitutionally sound." In keeping with Parker v. Randolph and the circuit court decisions, the New York Court of Appeals required of petitioner's confession that its content be "substantially similar" to his co-defendant's, and upheld

petitioner's conviction because both statements "cover[ed] all major elements of the crime involved. . ." People v. Cruz, 66 N.Y.2d 61,70, 485 N.E.2d 221,226 (1985). Contrary to petitioner's assertion [petition, p. 10], therefore, even under the standard advanced in the Parker concurrence, no Bruton violation occurred here.

After "fully recogniz[ing] that in most interlocking-confession cases, any error in admitting the confession of a non-testifying co-defendant will be harmless beyond a reasonable doubt" [422 U.S. at 79], Justice Blackmun, in his concurrence, found harmless any Bruton error in conducting a joint trial where, unlike the two other defendants, defendant Pickins made a written confession in addition to an oral one. Implicitly rejecting petitioner's argument that disparate reliability renders two confessions non-interlocking, the concurrence surely would find harmless any error in the joint trial here, where "the Cruz brothers agreed, in their separate statements, on the date and target of the crime, the participants in it, the motive of robbery, and the essential facts of how [petitioner] was injured and the station attendant killed" People v. Cruz, 66 N.Y.2d at 71, 485 N.E.2d at 227.

Appreciated by the Parker Court and other authorities is the fact that the potential problems in this area of the law arise when the "interlocking" is incomplete. For example, the Parker dissent posed a hypothetical situation where one defendant confesses to the planning and execution of a murder, while his co-defendant merely admitted his presence at the crime scene. 422 U.S. at 84-85. Likewise, the commentator cited by petitioner as labeling the Parker decision "inconclusive" [petition, p. 9], criticized that case based on his belief that it casts Bruton aside when a co-defendant makes "any inculpatory statement." Dawson, Joint Trials of Defendants in Criminal Cases: An Analysis of Efficiencies and Prejudices, 77 Mich. L. Rev. 1379, 1421 (1979). However, as the Parker plurality stated, an inculpatory statement does not a confession make. 422 U.S. at 75, n. 8. Indeed, the New York Court of Appeals in the instant case, relying on this

portion of the Parker decision, took issue with the Michigan Law Review analysis relied on by petitioner. 66 N.Y.2d at 70, 485 N.E.2d at 226. Therefore, in a case such as the one at bar, where the same facts are admitted by each defendant, and each statement makes out every element of felony murder, there is no doubt that the statements are fully interlocking and that the joint trial was proper under Parker.

Of course, it is not surprising that, so long as substantial similarity in the statements' content is required, the results of a case will be the same regardless of which Parker analysis is utilized. After all, "[t]he interlocking confession doctrine is closely related to the doctrine of harmless error." Tamilio v. Fogg, 713 F.2d 18,21 (2d Cir. 1983), cert. denied, ___ U.S. ___, 104 S.Ct. 706 (1984). However, even if one imagines a joint trial where fully interlocking confessions are admitted, and deemed a prejudicial Bruton error, such a scenario is not presented herein. Petitioner's confession, as recognized by the New York Court of Appeals, was corroborated by an array of "police testimony, forensic evidence and photographs which established the robbery and the killing, the location of the victim's body, the injuries to his face and the substantial damage to the office. . ." Additionally, "medical evidence of the trajectory of the bullets as they entered the victim's head" supported petitioner's statement that his brother was above the attendant when he (the brother) shot him. 66 N.Y.2c at 66, 485 N.E.2d at 223-224. Therefore, even if this Court deems it advisable to garner majority support for one of the Parker rationales, it should await a case in which the result hangs in the balance. R. Stein and E. Gressman, Supreme Court Practice 270 (5th ed. 1978).*

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* In addition to his argument that his confession was less reliable than the co-defendant's, petitioner contends that the co-defendant's statement "filled in a logical gap in [respondent's] case" (petition, p. 11). The gaps petitioner refers to are an explanation of why the individual to whom he confessed remained silent for five months and why petitioner and his brother went to this person's home after the murder. Initially, these arguments were presented to two State Appellate Courts in support of petitioner's separate contention that his trial "violated fair trial standards applicable to trials in

Footnote continued on next page

In sum, application of either of the two approaches advanced in Parker v. Randolph will most often, if not always, lead to the same result. A writ of certiorari should not issue, therefore, simply to announce the Court's preference for one of the Parker analyses. Certainly in this case, where the joint trial was proper under either Parker view, Supreme Court review is unnecessary.

Footnote continued:
New York involving multiple defendants" 66 N.Y.2d at 72, 485 N.E.2d at 228. Since petitioner's federal constitutional argument was not put forth in the state courts, petitioner should not be heard to raise it for the first time herein. Steagald v. United States, 451 U.S. 204,209 (1981). Furthermore, the gaps petitioner complains of were not essential to the state's case, and thus their inclusion at petitioner's trial cannot be said to have violated his rights under the confrontation clause. Tamilio v. Fogg, supra, 713 F.2d at 21. Additionally, as the New York Court of Appeals stated in response to the "logical gap" claim, any prejudice to petitioner "resulted not from the fact that [the co-defendant's] statement added substantial weight to the proof of [petitioner's] guilt, but from the fact that the denial of a severance prevented [petitioner] from obtaining a more favorable atmosphere in which to attack his confession. That may have harmed his case tactically, but it did not deny his fundamental right to a fair trial." 66 N.Y.2d at 73, 485 N.E.2d at 228.

CONCLUSION

A WRIT OF CERTIORARI SHOULD NOT ISSUE.

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